IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-909

TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY AND COLLEGES, et al.,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

EDMUND G. BROWN, JR., GOVERNOR OF THE STATE OF CALIFORNIA, et al.,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

CALIFORNIA AIR RESOURCES BOARD et al.,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Attorney General of the State of California, on behalf of Edmund G. Brown, Jr., Governor of the

State of California, et al., pursuant to the order of this Court, responds hereby to the Petition for Writ of Certiorari to Review the Judgment of the United States Court of Appeals of the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit in *Brown* v. *Environmental Protection Agency* (Nos. 73-3306; 73-3305; 73-3307) dated August 15, 1975, is reported at 521 F.2d 827.

JURISDICTION

The jurisdiction of this Court was invoked by petitioner, Environmental Protection Agency, pursuant to 28 U.S.C. 1254(1). Petition for Writ of Certiorari, p. 2.

QUESTION PRESENTED

Whether the Clean Air Act empowers the Administrator of the Environmental Protection Agency to impose sanctions on a State, or on administrative officials of the State, should the State or the officials fail to administer and enforce an implementation plan adopted by the Administrator.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions and regulations are set forth in Appendix A, infra, pp. ~~1a–23a.~~ 5–22.

STATEMENT OF THE CASE

The opinion of the lower court (521 F.2d 827) accurately articulates the posture of the instant case. Petition for Writ of Certiorari, pp. 3a–7a.

REASONS FOR DENYING THE WRIT

The sole holding of the Court below is that the Clean Air Act does not authorize the "imposition of sanctions on a State or its officials for failure to comply with the administrator's regulations which directs the State to regulate the pollution-creating activities of those other than itself * * *." Petition for Writ of Certiorari, Appendix A, p. 9a.

It is submitted that this is an insufficiently important question of federal law to merit decision by this Court. Supreme Court Rules, Rule 19.

Even if the constitutional question had been decided by the Court below, it is submitted that it is so clear as to be almost a postulate of our federal system that a federal administrator may not employ the Commerce Clause to justify forcing State governors to propose state legislation as dictated by a federal Administrator, State legislators to consider and adopt the proposals, the Governor to sign the legislation, and State agencies to promulgate regulations as dictated by the Administrator, under the threat of fining, and perhaps jailing the Governor, dissenting legislators, and agency heads. This prop-

osition is not sufficiently in doubt as to require consideration by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 1976

APPENDIX A
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

I. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * * * * *
>
> To regulate Commerce * * * among the several States * * *

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

II. Sections 101, 107, 110, 113 and 302(e) of the Clean Air Act of 1967, 81 Stat. 485, as amended by the Clean Air Act Amendments of 1970, 84 Stats. 1676, 42 U.S.C. 1857 et seq., as amended by Section 302, 85 Stat. 464 and Section 4 of the Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 256, provide in relevant part:

Section 101 (42 U.S.C. 1857)

Congressional findings; purposes of subchapter.

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization,

industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Section 107 (42 U.S.C 1857c-2)

Air quality control regions.

(a) Responsibility of State for air quality; submission of implementation plan.

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting

an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 110 (42 U.S.C. 1857c-5)

State implementation plans for national primary and secondary ambient air quality standards.

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance. and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan

under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and, (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standards; or

(ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) The State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph(2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available al-

ternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirement before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2)(A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D), of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307 (a) (relating to subpenas) shall be applicable to any proceeding under this subsection.

* * * * *

Section 113 (42 U.S.C. 1857c-8)
Federal enforcement procedures.

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator

that it will enforce such plan (hereafter referred to in this section as 'period of Federally assumed enforcement'), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b).

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 111(e) (relating to new source performance standards), 112(c) (relating to standards for hazardous emissions), or 119(g) (relating to energy-related authorities), or is in violation of any requirement of section 114 (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b).

(4) An order issued under this subsection (other than an order relating to a violation of section 112) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection

(or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a); or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of a finding that such person is violating such requirement; or

(3) violates section 111(e), 112(c), or 119(g); or

(4) fails or refuses to comply with any requirement of section 114.

Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the

Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

(C) violates section 111(e), section 112(c), or section 119(g) shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

* * * * *

Section 302 (42 U.S.C. 1857h)

Definitions.

When used in this chapter—

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

* * * * *

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

* * * * *

III. 40 C.F.R. Part 52 provides in pertinent part:

§ 52.23 (as amended Sept. 18, 1974, 39 Fed.Reg. 33512)

Violation and Enforcement.

Failure to comply with any provisions of this part, or with any approved regulatory provision of a state implementation plan, or with any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act. With regard to compliance schedules, a person or Governmental entity will be considered to have failed to comply with the requirements of this part if it fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required to contain,

or if the person Governmental entity fails to comply with such schedule.

* * * * *

Subpart F—California

* * * * *

§ 52.242 Inspection and maintenance program.

(a) Definitions:

(1) "Inspection and maintenance program" means a program to reduce emissions from in-use vehicles through identifying vehicles which need emission control-related maintenance and requiring that maintenance be performed.

(2) "Light-duty vehicle" means any gasoline-powered motor vehicle rated at 6,000 pounds GVW or less.

(3) All other terms used in this section that are defined in Appendix N to Part 51 of this chapter, are used herein with the meanings so defined.

(b) This section is applicable in the Metropolitan Los Angeles, San Diego, Sacramento Valley, San Joaquin Valley, and San Francisco Bay Area Intrastate Air Quality Control Regions (hereinafter referred to as the Regions).

(c) The State of California shall establish an inspection and maintenance program applicable to all light-duty vehicles registered in the Regions that operate on streets or highways over which it has ownership or control. No later than June 1, 1974, the State shall submit legally adopted regulations to EPA establishing such a program. The State may exempt any class or category of vehicles which it finds are rarely used on public streets

and highways (such as classic or antique vehicles). The regulations shall include

(1) Provisions for inspection of all light-duty motor vehicles at periodic intervals no more than one year apart by means of a loaded test.

(2) Provisions for inspection failure criteria consistent with the emission reductions claimed in the plan for the strategy. These emission reductions are 15 percent for hydrocarbons and 12 percent for carbon monoxide. These criteria are estimated to include failure of 50 percent of the vehicles in the first inspection cycle.

(3) Provisions to ensure that failed vehicles received within two weeks, the maintenance necessary to achieve compliance with the inspection standards. This shall include sanctions against noncomplying individual owners and repair facilities, retest of failed vehicles following maintenance, a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and knowedgeable operators to perform the tasks satisfactorily, and such other measures as may be necessary or appropriate.

(4) A program of enforcement to ensure that, following inspection or maintenance, vehicles are not intentionally readjusted or modified in such a way as would cause them no longer to comply with the inspection standards. This might include spot checks of idle adjustments and/or a suitable type of physical tagging. This program shall include appropriate penalties for violation.

(5) Provisions for beginning the first inspection cycle on October 1, 1975, and completing by September 30, 1976.

(6) Designation of an agency or agencies responsible for conducting, overseeing, and enforcing the inspection and maintenance program.

(d) After September 30, 1976, the State shall not register or allow to operate on its streets or highways any light-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(e) After September 30, 1976, no owner of a light-duty vehicle shall operate or allow the operation of such vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new vehicle.

(f) The State of California shall submit no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section, including the text of needed statutory proposals and needed regulations that it will propose for adoption. The compliance schedule shall also include:

(1) The date by which the State will recommend any needed legislation to the State legislature.

(2) The date by which necessary equipment will be ordered.

(3) A signed statement from the Governor and State Treasurer identifying the sources and amount of funds for the program. If funds cannot legally be obligated under existing statutory authority, the test of needed legislation shall be submitted.

O